

In the United States Court of Appeals  
for the Ninth Circuit

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ALBERS MILLING COMPANY, A Corporation,  
APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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On Appeal from the Judgment of the United States District  
Court for the Southern District of California

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MEMORANDUM FOR THE APPELLEE ON  
APPELLANT'S PETITION FOR REHEARING

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**In the United States Court of Appeals  
for the Ninth Circuit**

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No. 15,869

ALBERS MILLING COMPANY, A Corporation,  
APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

**On Appeal from the Judgment of the United States District  
Court for the Southern District of California**

---

**MEMORANDUM FOR THE APPELLEE ON  
APPELLANT'S PETITION FOR REHEARING**

---

*To the Honorable Albert Lee Stephens, Chief Judge,  
Homer T. Bone and Walter L. Pope, Judges of  
the United States Court of Appeals for the  
Ninth Circuit:*

Appellee, the United States, is in receipt of a copy of a petition for rehearing which appellant states that it proposes to print and file in this case, and in which appellant requests that the rehearing be

held *en banc*. Although we respectfully submit that for the reasons set forth by this Court in its opinion in the instant case, by the Court of Claims in *Kellogg Co. v. United States*, 133 F. Supp. 387, certiorari denied, 350 U.S. 905, and by the United States in its briefs filed in this Court in this case and in *Fisher Flouring Mills Co. v. United States* (No. 15,819), the decisions of the Courts in this case and in the *Kellogg* case are correct, and although it is submitted further that appellant in the instant case is liable for the transportation taxes in issue, we do not in the public interest oppose the granting of appellant's petition for rehearing *en banc* for the reasons below stated:

1. This Court on September 10, 1958, rendered its opinion and judgment in this case affirming in favor of the United States as appellee a judgment of the United States District Court for the Southern District of California, Central Division.

2. On October 6, 1958, this Court as constituted by Judges Healy, Fee and Hamlin, rendered its opinion and judgment in *Fisher Flouring Mills Co. v. United States of America* (No. 15,819) reversing in favor of appellant the judgment of the United States District Court for the Western District of Washington, Northern Division. Prior to the hearings in the *Albers* and *Fisher* cases the United States requested the Clerk of this Court to set both cases for hearing together on the same day but this was not done, apparently because the cases arose in different districts.

3. Both of these cases present an identical question, namely whether taxpayer was not required by Section 3475(a) of the Internal Revenue Code of 1939 (as added by Section 620(a), Revenue Act of 1942, c. 619, 56 Stat. 798) to pay transportation taxes on shipments of property which were made entirely within the United States by carriers within the United States, solely because the freight charges were purportedly paid by checks and bank drafts manually delivered to offices of the carriers located outside the United States and where the sole purpose of this method of payment was to avoid the transportation tax.

4. On or before November 5, 1958, the United States will file with this Court its petition addressed to Judges Healy, Fee and Hamlin, requesting a rehearing *en banc* in the *Fisher* case. A copy of this petition, which is presently being printed, is contained in the appendix to this memorandum and made a part hereof. With all respect it is our view that the *Fisher* case was incorrectly decided.

5. Additionally, there is presently pending before this Court the same issue in an appeal by taxpayer from a judgment of the United States District Court for the Western District of Washington, Northern District, rendered September 16, 1957, in *Pacific Gamble Robinson Co. v. United States* (No. 15,818). The record and appellant's brief in this case have been printed and filed and a stipulation has been filed and approved providing that time for filing briefs is extended to thirty days after the final decision by this

Court in the instant case and in the *Fisher Flouring Mills Co.* case.

6. Because two panels of this Court have reached opposite conclusions on the same issue, and because a third case on this issue is presently pending before this Court, it is the view of the United States that the petitions for rehearing *en banc* in the case at bar and in *Fisher Flouring Mills Co.* should be granted. It is respectfully submitted it is in the public interest that the law be the same and settled throughout the circuit and that all taxpayers should be treated identically in every part of the circuit.

Accordingly, for the reasons above stated the United States submits that in the public interest petitions for rehearing *en banc* filed in this case and in the *Fisher* case should be granted.

Dated: Washington, D. C.

November , 1958

Respectfully submitted,

CHARLES K. RICE,  
*Assistant Attorney General.*

LEE A. JACKSON,  
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JOHN G. MESSER,  
*Assistant United States Attorney.*



## APPENDIX

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 15,819FISHER FLOURING MILLS COMPANY, A Corporation,  
APPELLANT*v.*

UNITED STATES OF AMERICA, APPELLEE

---

ON APPEAL FROM THE JUDGMENT OF THE  
UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION

---

PETITION BY THE APPELLEE  
FOR REHEARING

---

TO THE HONORABLE WILLIAM HEALY,  
JAMES ALGER FEE AND OLIVER D. HAM-  
LIN, JUDGES OF THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH  
CIRCUIT.

Appellee hereby respectfully petitions for a rehearing of the above-entitled cause by the Court *en banc* for the following reasons:

1. On October 6, 1958, the Court as constituted by Your Honors rendered its opinion and judgment re-

versing in favor of appellant the judgment of the United States District Court for the Western District of Washington, Northern Division, in this case.

2. On September 10, 1958, this Court as constituted by Chief Judge Stephens and Judges Bone and Pope, rendered its opinion and judgment in *Albers Milling Company v. United States* (No. 15,869) affirming in favor of the United States as appellee a judgment of the United States District Court for the Southern District of California, Central Division.

3. Additionally, there is presently pending before this Court an appeal by taxpayer from a judgment of the United States District Court for the Western District of Washington, Northern Division, rendered September 16, 1957, in a cause entitled *Pacific Gamble Robinson Co. v. United States* (No. 15,818). The record and appellant's brief in this case have been printed and filed and a stipulation has been filed and approved providing that time for filing briefs is extended to thirty (30) days after the final decision by this Court in the instant case and in the *Albers Milling Co.* case.

4. The question presented in each of these three cases is identical, namely, whether taxpayer was not required by Section 3475(a) of the Internal Revenue Code of 1939 (as added by Section 620(a), Revenue Act of 1942, c. 619, 56 Stat. 798) to pay transportation taxes on shipments of property which were made entirely within the United States by carriers within the United States, solely because the freight charges were purportedly paid by checks and bank drafts manually delivered to offices of the carriers located outside the United States, and where the sole purpose of this method of payment was to avoid the transportation tax.

5. Two panels of this Court have reached opposite conclusions on the same issue and a third case is pending before this Court undecided raising the same issue. Prior to the hearings in the *Albers* and *Fisher* cases the United States requested the Clerk of this Court to set both cases for hearing together on the same day but this was not done, apparently because the cases arose in different districts.

6. Taxpayer in the *Albers* case has been granted thirty (30) days extended time in which to file its petition for rehearing thereby extending its time to November 10, 1958. We are informed that it is the intention of taxpayer *Albers Milling Co.* to file a timely petition in its case for rehearing by this Court *en banc*. Moreover, it is the intention of the United States as appellee in the *Albers Milling Co.* case, upon being informed that taxpayer there has filed its petition for rehearing, to inform the Court as constituted in the *Albers Milling Co.* case that the United States is of the view that in the public interest both cases should be reheard by the Court *en banc*.

7. The total amount of taxes involved in the three cases pending before this Court aggregate more than \$153,000 without taking into consideration interest which will to date exceed fifty percent. The United States respectfully submits that it is in the public interest that the law be the same and settled throughout the circuit and that all taxpayers should be treated identically in every part of the circuit.

8. The question presented is one of importance and is pending in other cases and has been decided by the United States Court of Claims in *Kellogg Co. v. United States*, 133 F. Supp. 387, certiorari denied, 350 U.S. 903, in favor of the United States. We respectfully submit that for the reasons set forth by this Court in its decision in *Albers Milling Co. v.*

*United States* and by the Court of Claims in the *Kellogg Co.* case, and by the United States in its briefs filed in the *Albers Milling Co.* case and in the instant case, that the decisions of the Courts in *Albers Milling Co.* and *Kellogg Co.* are correct, and it is further respectfully submitted that the appellant in the instant case is liable for the transportation taxes in question and that the judgment of the District Court should be affirmed.

Accordingly, for all of the reasons above stated the United States earnestly petitions that in the public interest the Court grant a rehearing *en banc* in the above entitled case.

Dated: Washington, D. C., October 29, 1958.

Respectfully submitted.

CHARLES K. RICE,  
*Assistant Attorney General.*

LEE A. JACKSON,  
I. HENRY KUTZ,  
HELEN A. BUCKLEY,  
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CHARLES P. MORIARTY,  
*United States Attorney.*

## CERTIFICATE OF COUNSEL

I, CHARLES K. RICE, one of the attorneys for the appellee, certify that this petition is presented in good faith, that it is not interposed for delay, and that in my judgment it is well founded.

Dated: Washington, D. C., October 29, 1958.

CHARLES K. RICE,  
*Assistant Attorney General*

